Supreme Court, U.S.
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NO. 93-1781

IN THE
United States Supreme Court
OCTOBER TERM, 1993

MICHAEL SPENCE,

Plaintiff-Petitioner,

vs.

NORFOLK SOUTHERN RAILWAY COMPANY AND NORFOLK SOUTHERN CORPORATION,

Defendants-Respondents.

APPEAL FROM THE GEORGIA SUPREME COURT

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORAI

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QUESTIONS PRESENTED

1. Whether a management-level employee of a railroad, who has not suffered a physical work-related injury, may pursue a claim under the Federal Employers' Liability Act for what he contends is a nervous breakdown allegedly caused by the stressful nature of his job?

2. Whether a claim for a mental injury may be prosecuted under the Federal Employers' Liability Act when its symptoms and job-related cause were known to the Petitioner more than three years prior to the filing of his FELA lawsuit? I.e., is Petitioner's claim barred by the FELA limitations statute?

LIST OF AFFILIATED CORPORATIONS

Norfolk Southern Corporation

Norfolk Southern Railway Company

Norfolk & Western Railway Company

Alabama Great Southern Railroad Company, The

Atlanta and East Carolina Railway Company

Camp Lejeune Railroad Company

Central of Georgia Railroad Company

Chesapeake Western Railway

Cincinnati, New Orleans and Texas Pacific Railway Company

Georgia Northern Railway Company, The

Georgia Southern and Florida Railway Company

Live Oak, Perry and South Georgia Railway Company

New Orleans Terminal Company

State University Railroad Company

Tennessee, Alabama and Georgia Railway Company

Tennessee Railway Company

North American Van Lines

Triple Crown Services, Inc.

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STATUTES INVOLVED

The only statute involved in this case is the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.*

STATEMENT OF THE CASE

Respondents do not agree with nor accept the recitation of facts contained in the petition for certiorari. The depositions, interrogatory answers and affidavits filed below will speak for themselves should the Court grant this petition. In so doing, the record will reflect that Petitioner's job was no different from, nor more stressful than, those of other employees within the railroad.

Among other things, it is inaccurate for Petitioner to contend that the number of communications coordinators was halved. While two individuals did accept early retirement in September 1987, they were replaced by others within a few weeks. Petitioner also implies in his brief that he regularly worked seventy day periods without time off. The record reveals that if such a period of work transpired, it did so only on one occasion.

Respondents dispute that analyst jobs were eliminated "long before" computers were in place. Petitioner's Brief, p. 4. It also is inaccurate and misleading to characterize an analyst's job as similar to that of an air traffic controller. *Id.* The positions are not comparable at all.

For purposes of evaluating the present petition, Respondents show that the following narrative reflects the evidence in the record of this case. The Petitioner was employed by the Norfolk Southern Railway Company (f/k/a/ Southern Railway Company) from the mid-1970s until January 1989. At all times relevant to this litigation, he was employed by the railroad as a communications coordinator. In that position, Petitioner's job was to receive telephone calls relative to any problems with the commu-

nication network of the Norfolk Southern Railway Company. He would then take steps to ensure that such problems were corrected. Within Norfolk Southern Railway Company, a communications coordinator is a management-level position.

According to the Petitioner's allegations, the railroad began reducing its work force in September 1987. This reduction reportedly increased the amount of work he was required to perform. Petitioner also argues that in addition to his normal responsibilities, he was required to perform the duties of a detector analyst on numerous occasions.

Prior to September 1987, Petitioner reportedly suffered no stress-related problems; however, beginning in late 1987 and continuing through 1988, the Petitioner claims to have experienced difficulty sleeping and a loss of weight. He blames these developments upon the increase in his work load. Mr. Spence testified that beginning in 1987 he complained regularly to his superiors about his heavy work load and the adverse effect it was having upon his life and health.

The Petitioner claims that his problems became particularly severe during the last month or so of 1988, and, as a result of his work, he experienced crying attacks on the job during the first week of January 1989. Petitioner never suffered a physical injury while an employee of the railroad, but he does allege that he developed physical problems as a result of his stress-related condition. The physical injuries identified are excessive hair loss, psoriasis, stomach tightening and loss of weight. Petitioner alleges that on January 19, 1989, he could no longer function because of what he characterizes as a "total breakdown". That "breakdown" forms the basis for the

underlying litigation. Mr. Spence was the only coordinator to suffer a claimed nervous breakdown or to suggest that the job was beyond his emotional capacity.

REASONS WHY THE WRIT SHOULD BE DENIED

I. PLAINTIFF HAS FAILED TO PRESENT A CLAIM FOR EITHER NEGLIGENT OR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

The Georgia Court of Appeals ruled correctly when it rejected Petitioner's claim in *Norfolk Southern Railway Company v. Spence*, 210 Ga. App. 284, 435 S.E.2d 680 (1993), by applying the same reasoning articulated by this Court in *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 566 n. 13, 107 S.Ct. 1410, 1416 n. 13, 94 L.Ed 2d 563 (1987). *Buell* determined that in order to present a claim for emotional injuries under the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.*, a plaintiff must establish that he suffered a severe emotional injury as a result of "unconscionable abuse" on the part of his employer.

The *Buell* decision recognized that if an employee were not required to demonstrate unreasonable conduct on the part of his employer, virtually every intra-office dispute and personnel matter could be transformed into FELA litigation. *Id.* It is a reality of our times that we live in a society full of daily stresses at home and in the workplace. If job stress, without more, can support FELA litigation, the courts will be swamped, and it will be increasingly difficult, if not impossible, to manage a railroad on a day-to-day basis.

The Georgia Court of Appeals resolved Petitioner's claim against him even though it assumed that Mr. Spence had actually stated a claim under the FELA; however, relief such as he seeks simply is unavailable under the FELA. Petitioner did not suffer any on-the-job injury connected with an identifiable or traumatic incident. Instead, Petitioner claims only that because his job was stressful, he developed emotional problems and is thereby entitled to relief under the FELA. The FELA was not created to provide judicial relief for such stress claims, as the majority of courts have already found.

The Fifth and Seventh Circuit Courts of Appeal have squarely held that the FELA does not create a cause of action for tortious harms caused by acts which lack any physical contact or threat of physical contact with the victim. *See Gough v. Natural Gas Pipeline Company of America*, 996 F.2d 763, 765 (5th Cir. 1993)[1]; *Ray v. Consolidated Rail Corp.*, 938 F.2d 704, 705 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 914 (1992). As explained by the Fifth Circuit, the injury rule has two important functions for courts evaluating mental injuries:

> One purpose is to 'provide courts with an objective means of ensuring that the alleged mental injury is not feigned.' (cit. omitted). A more important purpose of the rule is to provide a principled basis for limiting liability. Traumatic events may cause foreseeable emotional distress through a broad range of time and space. Jurisdictions that apply expansive recovery rules such as the

[1] *Gough* is a Jones Act case, *see* 46 U.S.C. §688. Rules that govern liability under the Jones Act are the same as those which apply under the FELA. *See Yehia v. Rouge Steel Corp.*, 898 F.2d 1178, 1184 (6th Cir. 1990).

> bystander theory must depend upon proximate cause to define the boundary of liability. We are wary of such ad hoc adjudications and prefer predictable rules for the determination of liability.... The bright line impact or injury rule performs a similar function.

Gough, at p. 765-66. In the instant case, Petitioner's claim plainly fails under the injury rule; thus, no reason exists for this Court's further review of his case.[2]

Petitioner argues that his case merits review because of a combined case presently pending before the Court, *Consolidated Rail Corp. v. Gottshall* and *Consolidated Rail Corp. v. Carlisle*, Supreme Court Case No. 92-1956. Respondents submit otherwise. Should a decision in favor of the Consolidated Rail Corporation be issued, there clearly would be no reason to prolong further this litigation. Even if that case is resolved against Conrail, however, such a disposition will not suggest that additional review of this case is warranted.

The case at bar presents fundamentally different facts from those in *Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355 (3d Cir. 1993). In *Gottshall*, the plaintiff and his best friend were performing rigorous physical work in the broiling sun for long hours. As a direct result of the harsh working conditions, plaintiff's best friend suffered

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[2] The injury rule is the test pursuant to which Petitioner's claim would be evaluated were the Court to examine Georgia law (as per *Buell* at 480 U.S. 568-70) for assistance in analyzing this case. *See OB-GYN Assoc. of Albany v. Littleton*, 259 Ga. 663, 665, 386 S.E.2d 146 (1989).

a heart attack which ultimately proved fatal. The friend lingered as the plaintiff attempted to revive him while their supervisor acted inappropriately and in a manner which the appellate panel clearly disapproved. Whether this Court determines that the plaintiff in *Gottshall* has stated a claim under the FELA has no bearing upon whether the Petitioner in this case is entitled to proceed. Mr. Gottshall directly participated in a traumatic event involving the death of a close personal friend. His case bears no resemblance to that of the Petitioner here.

Carlisle v. Consolidated Rail Corp., 990 F.2d 90 (3d Cir. 1993), is factually distinct as well. The plaintiff there established that co-workers in similar positions had suffered cardiac arrests, nervous breakdowns and clinical depression. The Federal Railway Administration had issued a report criticizing the defendant for its "hazardous working conditions". More importantly, the plaintiff was abused by an alcoholic supervisor. *Id.*, pp. 92-93. Petitioner Spence was not subjected to abusive behavior, he alone among his peers developed emotional problems, and his job is not at all comparable to that of a train dispatcher in the northeast corridor. Therefore, additional consideration of this case is unwarranted regardless of the resolution in *Carlisle*.

Every job is stressful to some degree. Allowance of FELA claims for psychological problems which are unconnected to a physical injury or unconscionable conduct by the employer is beyond the FELA's scope, exceeds the intent of Congress, and will result in a multitude of cases being filed by disgruntled employees. The issue of stress-related FELA claims was correctly resolved by the district court in *Kraus v. Consolidated Rail Corp.*, 723 F.Supp. 1073, 1090 (E.D.Pa. 1989), *appeal dis-*

missed 899 F.2d 1360 (3d Cir. 1990), which dismissed them and found that,

> ...[P]laintiffs, who allegedly suffer from stress-related physical or purely emotional injuries or illnesses caused by their general working conditions, fail to state a claim under the FELA. Lawyers, doctors, bus drivers, police officers, laborers, and, yes, even judges, face stressful conditions everyday. To suggest that Congress intended to single out railroad workers... as worthy of special protection from such stress would be pure folly. Job-related stress is simply not the type of problem intended to be dealt with by the FELA.

Accord Moody v. Boston & Marine Corp., 921 F.2d 1, 5 (1st Cir. 1990); *Holliday v. Consolidated Rail Corp.*, 914 F.2d 421, 423-24 (3d Cir. 1990), *cert. denied* 498 U.S. 1090 (1991). *See also Lewis v. Union Pacific R. Co.*, 497 N.W.2d 33 (Neb. 1993); *Handy v. Union Pacific R. Co.*, 841 P.2d 1210 (Utah Appeals 1992).

The Georgia Court of Appeals assumed *arguendo* that Petitioner could in theory state a claim for relief under the FELA. Having examined the substantive evidence supporting Petitioner's allegations, however, the state court properly found that Petitioner's case lacked substantive merit. Consequently, summary judgment in the railroad's favor was granted. There is no reason for this Court to review further the allegations advanced by the Petitioner in this litigation. Whatever the result in the FELA litigation presently before the Court, its adjudication will not materially alter the result in this case. For that reason, this petition should be denied.

II. PETITIONER'S CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS.

Petitioner's claim is barred by 45 U.S.C. §56, which requires that all FELA lawsuits must be filed within three years of the time when an injury occurs. A plaintiff bears the burden of establishing that he has filed an action under the FELA in a timely manner. *Crisman v. Odeco, Inc.*, 932 F.2d 413, 416 (5th Cir.), *cert. denied*, 112 S.Ct. 337 (1991). As Mr. Spence's claim was not filed in a timely manner, it should be dismissed for that reason.[3]

Under *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949), and *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed. 2d 259 (1979), the discovery rule applies in FELA cases. *Dubose v. Kansas City Southern Ry. Co.*, 729 F.2d 1026, 1029-30 (5th Cir.), *cert. denied*, 469 U.S. 854 (1984). Under that rule, "...[A] claim accrues under FELA when the plaintiff possess sufficient critical facts from which the injury and its cause, including its work-relatedness, should be plainly know." *Robb v. CSX Transp., Inc.*, 204 Ga. App. 690, 693, 420 S.E. 2d 370 (1992). The evidence of record in this case is replete with testimony which demonstrates that Petitioner was aware of the problems he claims to have suffered and their alleged work-related causation well over three years before this lawsuit was filed on January 17, 1992.

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[3] Respondents raised this issue below; however, the Georgia Court of Appeals did not address it since it ruled against Petitioner on other grounds.

According to Mr. Spence's interrogatory answers, he began to experience problems with his health stemming from his job as early as September 1987, and he claims to have complained continuously about that fact to his supervisors. His answer to interrogatory 6 of the railroad's first interrogatories states that Petitioner went to his supervisor's office "a number of times" in 1987 to discuss his work, the stress he was under and the *"severe impact this working condition was having on [his] health..."*. (Emphasis supplied). In the affidavit which Petitioner filed in opposition to the railroad's motion for summary judgment, he testified as follows:

> The stress from my work took an ever increasing toll upon me in late 1988 and early 1989. My insomnia became progressively worse, my weight loss increased dramatically [beginning in December 1988], my attentiveness to tasks grew extremely diminished and I began to suffer from episodes of acute sobbing.

Petitioner's deposition makes clear that the "episodes of acute sobbing", which he connected to the stress of his job, occurred during the first week of January 1989.

Petitioner did not file his lawsuit in this case until January 17, 1992. As shown above, Petitioner possessed "sufficient critical facts from which [his] injury and its cause, including its work-relatedness, [could have been] plainly known" well before January 16, 1989 (the statutory limit). *See Robb v. CSX Transp., Inc., supra* at 693. *See also Jones v. Maine Cent. R. Co.*, 690 F.Supp. 73 (D. Me.1988); *McCoy v. Union Pacific R. Co.*, 796 P.2d 646 (Or. App. 1990).

Petitioner argued below that because in his opinion he had not experienced a complete breakdown until January 19, 1989, the statutory bar did not apply; however, "that [petitioner's"] injury had not reached its maximum severity [in 1988 and early 1989] but continued to progress does not affect [the fact that 45 U.S.C. §56 bars the lawsuit]." *See Fries v. Chicago & Co. Transp. Co.*, 909 F.2d 1092, 1096 (7th Cir. 1990).[4]

Because Petitioner did not file his lawsuit within the time allowed by 45 U.S.C. §56, this case should be dismissed for reasons independent of those provided by the Georgia Court of Appeals below. Accordingly, nothing will be gained by further review of this litigation by this Court.

III. CONCLUSION.

Petitioner's case has been adequately considered by the courts below. The circumstances of his case do not lend themselves to relief under the Federal Employers' Liability Act. Equally important, he has failed to comply with the limitations requirement of 45 U.S.C. §56. Nothing further is to be gained from prolonging this litigation.

A number of conditions in life combine to create stress, both at home and on the job. If every instance of work-related stress may give rise to litigation under the FELA, an intolerable situation will be created. The time

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[4] The fact that Petitioner's claimed injury is mental in nature does not change this result. The same rules of limitation apply to such injuries. *See Armstrong v. Trico Marine, Inc.*, 923 F.2d 55, 58-59 (5th cir. 1991); *Puthe v. Exxon Shipping Co.*, 802 F.Supp. 819, 829-30 (E.D.N.Y. 1992), *aff'd. other grounds* 2 F.3d 480 (2d Cir. 1993).

and expense of defending these cases will unduly burden both employers and the courts. The FELA was never intended to provide relief of this nature.

WHEREFORE, Respondents pray that the petition be dismissed.

Respectfully submitted,
NEELY & PLAYER

By:
Edgar A. Neely, Jr.

By:
William C. Thompson

CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI upon counsel of record for Plaintiff-Petitioner, Michael Spence:

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By depositing a copy of this response in a United States post office or mail box, with first-class postage pre-paid, addressed to the counsel listed above.

William C. Thompson